

Before the  
Federal Communications Commission  
Washington D.C. 20554

In the Matter of )  
 )  
Telecommunications Services )  
For Individuals with Hearing and Speech ) CC Docket No. 03-123  
Disabilities, and the Americans with )  
Disabilities Act )  
\_\_\_\_\_ )

COMMENTS OF CSD ON  
PAYMENT FORMULA AND FUND SIZE ESTIMATE  
FOR INTERSTATE TRS FUND  
FOR JULY 2006 THROUGH JUNE 2007

**I. Introduction**

Communication Service for the Deaf, Inc. (CSD) hereby submits comments in response to the proposed provider payment formula and compensation rate for video relay service (VRS) submitted by the National Exchange Carriers Administration (NECA) to the Federal Communications Commission (FCC) on May 1, 2006.<sup>1</sup> CSD is a non-profit organization, which, through its relationship with Sprint, serves as a provider of VRS throughout all fifty states and the United States territories. As an organization run by and for deaf consumers and a leader in the field of relay services since the 1980s, CSD considers the impact of VRS regulatory actions from the perspective of both a provider and a relay consumer. From each of these perspectives, CSD has grave concerns about the lack of consistency,

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<sup>1</sup> Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate for July 2006–June 2007 (May 1, 2006) (NECA Filing), subsequently amended in Interstate Telecommunications Relay Services Fund Payment Formula and Fund Size Estimate, *Errata* (May 10, 2006). The FCC invited comments on this NECA filing in a public notice released on May 12, 2006, DA 06-1031.

uniformity and transparency in the FCC's and NECA's VRS ratemaking process. CSD specifically opposes the decision to categorically exclude all costs associated with marketing and advertising, a decision that appears without justification and without notice to and comment from the public. We urge the FCC to reinstate these expenses and to complete its pending rulemaking proceeding on a VRS cost methodology, in order to achieve a compensation methodology that is both consistent with the American with Disabilities Act's (ADA's) mandate for functional equivalency and one that fairly reimburses providers for their reasonable costs.

## **II. Background**

The FCC first approved VRS as a telecommunications relay service (TRS) in March of 2000.<sup>2</sup> In response thereto, on November 9, 2000, NECA and the Interstate TRS Advisory Council recommended guidelines for VRS cost recovery. Specifically, NECA proposed separating out the reimbursement rate for VRS and using the same per-minute compensation methodology it had been using to develop the rate for traditional TRS. In accordance therewith, NECA also proposed expanding the TRS Center Data Request to include specific VRS sections that would capture VRS costs and demand separately from other relay services. On December 21, 2001, the FCC released a Memorandum Opinion and Order and Further Notice of Proposed Rulemaking in response to these and other recommended TRS cost

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<sup>2</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order and Further Notice of Proposed Rulemaking*, CC Dkt. No. 98-67, FCC 00-56, 15 FCC Rcd 5140 (March 6, 2000) (Improved Services Order).

recovery guidelines.<sup>3</sup> In that order, the FCC adopted NECA's recommendation to temporarily employ a VRS cost recovery rate that used the same average per minute compensation methodology as was used for traditional TRS "to ensure that providers are able to recover their fair costs related to providing VRS."<sup>4</sup> The Commission declined to adopt this methodology on a permanent basis, however, choosing instead to gather additional information on both the compensation method best suited to VRS and the type of data that needed to be collected from VRS providers to calculate the compensation rate. Among other things, the Commission explained that it was "not convinced that this methodology will provide adequate incentives to carriers to provide video relay services."<sup>5</sup> This proceeding is still pending.

The FCC next revisited the issue of VRS methodology on June 30, 2003, when the Consumer and Governmental Affairs Bureau (CGB) ordered, with less than twenty-four hours notice, the drastic reduction of the VRS compensation per minute rate for the July 2003–June 2004 Fund period.<sup>6</sup> Without prior notice, in this order, the FCC departed from its decade-long reliance on a cost plus mark-up methodology for VRS. In place of allowing a fair return over expenses, CGB adopted a brand new

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<sup>3</sup> *Telecommunications Services for Individuals with Hearing and Speech Disabilities, Recommended TRS Cost Recovery Guidelines, Request by Hamilton Telephone Company for Clarification and Temporary Waivers, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking*, CC Dkt No. 98-67, FCC 01-371(December 21, 2001).

<sup>4</sup> *Id.* at ¶34.

<sup>5</sup> *Id.* at ¶23.

<sup>6</sup> *In the Matter of Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Order*, CC Dkt No. 98-67, DA 03-2111 (June 30, 2003) (2003 Rate Order).

methodology that applied an 11.25% rate of return on VRS investment.<sup>7</sup> In addition, the Bureau questioned labor costs claimed by certain providers,<sup>8</sup> and adjusted, without explanation, the tax allowances claimed by VRS providers. This significant departure from prior FCC practice was neither accompanied by published proposals to solicit public comment, nor instructions for the uniform application of the new compensation methodology. At the time, providers who had come to rely upon the prior methodology for their business plans were astonished to learn that they had less than a day to adjust their services to the new compensation scheme. Additionally, the impact of this sudden action on consumers was severe. As CSD has previously explained, “VRS went from a service that was available around the clock with answer speeds approaching or meeting those for traditional TRS to a service that [became] available only on limited days, at limited times, and, for some providers, with answer speeds that [fell] far below the functional equivalence standard anticipated by Congress.”<sup>9</sup> Although the FCC made clear that nothing in the June 2003 order prejudged the outcome of its December 2001

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<sup>7</sup> At the time, CSD and other providers raised considerable objection to the sudden shift. Unlike broader traditional telecommunications operations which are primarily capital intensive (i.e. the deployment and burying of fiber, deployment of massive switching equipment, etc.), the various relay products (IP relay, VRS, TRS, and speech-to-speech) are extremely labor intensive. A typical VRS capital investment for an established provider may be significantly less than 10% of the labor costs associated with providing these relay products. Accordingly, an 11.25% return on invested capital would provide less than a 1.1% return on total “reasonable” VRS costs. The 11.25% return on invested capital currently being applied to providers through NECA’s submissions is an unreasonable return, and significantly threatens the long-term sustainability of this market.

<sup>8</sup> 2003 Rate Order at ¶36.

<sup>9</sup> Comments of CSD on Payment Formula and Fund Size Estimate – Interstate TRS Fund for July 2004 through June 2005 (May 19, 2004) at 8-9.

proceeding, it failed to take steps to complete that proceeding by proposing a permanent VRS cost recovery methodology.<sup>10</sup>

NECA filings for the next two funding periods generally followed the guidelines provided in the June 2003 order, though without permanent rules in place for a VRS cost methodology, recommendations made in these filings as well became subject to provider challenges and further FCC adjustments. For example, in its June 30, 2004 order, the FCC adopted interim rates only, with a promise to make rate adjustments retroactive to July 1, 2004, after providers submitted additional information on supplemental cost data relating to capital investment and adjustments to cost disallowances.<sup>11</sup> In its June 28, 2005 Order, again, the FCC had to adjust the NECA rate, this time because the proposed rate of \$5.924 had been driven by the costs and demand data of one provider.<sup>12</sup> Specifically, acknowledging the “lack of certain standards for VRS,” the FCC increased the VRS rate to \$6.644 per minute for the 2005-2006 Fund year, in order to reflect the median of the rates of the seven VRS providers, based on their cost and demand data.<sup>13</sup> Again, the FCC noted that it had “not yet settled on a cost recovery methodology for VRS, and that this issue remains open.”<sup>14</sup>

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<sup>10</sup> 2003 Rate Order at ¶45.

<sup>11</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CC Dkt No. 98-67, DA 04-1999 (June 30, 2004).

<sup>12</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities*, Order, CC Dkt No. 98-67, CG 03-123, DA 05-135 (June 28, 2005).

<sup>13</sup> Id. at ¶26.

<sup>14</sup> Id. at ¶28.

Put simply, over the past several years, in compliance with instructions from the FCC, NECA has repeatedly and often unexpectedly revised longstanding policies governing VRS cost recovery. These sudden shifts in allowable expenses have had have a direct and negative bearing on the ability of VRS providers to recover their costs, and in at least one case, significantly impeded the ability of providers to provide comprehensive VRS to consumers. Justification for these abrupt changes have often, if not always, come after the fact, only *after* the changes have been made. The result is that VRS providers have been in the precarious position of not having assurances about the rate methodology to be used, the expense categories to be permitted, and the compensation they may expect to receive as each May NECA filing has approached. The instability and inconsistency that has been characteristic of the NECA filings and the FCC's responses to those filings over the past three years is once again apparent in this year's filing.

### **III. NECA's Decision to Deny all Marketing Costs is Unprecedented and Unexplained.**

On May 1, 2006, NECA submitted to the FCC its payment formula for the 2006–07 Fund year, proposing to reduce the VRS per minute rate to \$6.116; a corrected calculation increased this rate to \$6.138 a few days later. What is unusual, however, is that despite NECA's alleged reliance on the FCC's June 30, 2004 TRS Order and corresponding modifications to the annual Relay Services Data

Request,<sup>15</sup> its filing deviates from the guidelines contained in both of these documents. Further, the filing reflects a marked departure from NECA's *own presentation* on the proposed VRS rate for 2006–07, given at this year's TRS Advisory Council meeting on April 18, 2006. Specifically, both the data collection forms and instructions that went out to providers on October 3, 2005, as well as NECA's presentation presumed the inclusion of expenses associated with marketing and outreach.<sup>16</sup> It was only *after* NECA made public its recommendations for the 2006-07 year (which were based on the data that providers submitted in compliance with its data request) that, apparently on the FCC's directive, the Fund Administrator did an about-face and categorically excluded all marketing and advertising expenses. Now, without any additional explanation or justification from NECA or the FCC, NECA asserts its "understanding that costs of providers marketing their own TRS services are not includable in the formulas."<sup>17</sup> Although this change comes after sixteen years of accepting these expenses, no Commission precedent has been cited; nor is this change authorized or directed by any specific FCC rule. On the contrary, in violation of the Administrative Procedure Act's

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<sup>15</sup> NECA Filing at 4. Many of these modifications were discussed and agreed upon at a meeting of the TRS Advisory Council and various VRS providers held in September 2004 in South Carolina, in response to the June 2004 rate order.

<sup>16</sup> The Data Request defined marketing and advertising expenses as "expenses associated with promoting TRS services within the community," and outreach expenses as "expenses of programs to educate the public on TRS." The specific data requested to justify expenses associated with each of these line items were almost identical.

<sup>17</sup> NECA Filing at 8.

protections for notice and comment, the FCC has impermissibly and arbitrarily requested NECA to discard this category of expenses.<sup>18</sup>

CSD does not question that NECA and the Commission have the authority to reject or adjust certain marketing expenses that may be unreasonable. However, before taking such action, the FCC has an obligation to define these expenses, as well as to determine an appropriate standard of reasonableness. This can and must be achieved through a rulemaking proceeding that is open to the public. It would be arbitrary and capricious for the Commission to simply accept NECA's current recommendation to exclude all marketing costs without engaging in an open process that provides notice to the public of the proposed policy change, gathers comment from interested parties, including consumers, and provides a thorough and sound analysis for a decision on this matter.

#### **IV. Comprehensive Outreach and Education Efforts are Necessary to Achieve Functional Equivalency**

There is little dispute that the ADA is a remedial statute, designed to fully integrate individuals with disabilities who previously had been denied access to the mainstream of society. Lack of access to the telephone for the first hundred years of its existence in American culture made the isolation of deaf, hard of hearing and speech disabled communities particularly acute. Because of this, when the ADA was enacted, it was obvious that the mere passage of the Act would not be enough to

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<sup>18</sup> Administrative Procedure Act, 5 U.S.C. §552. Also disturbing is NECA's failure to keep its Advisory Committee apprised of its cost recovery analysis. Despite repeated requests for data prior to this year's filing, it is CSD's understanding that the Council was neither informed of the revised methodology, nor given the opportunity to approve it before the filing was submitted to the FCC.



educate consumers with hearing loss about their new rights. Considerable effort would be needed to break through the segregation that had pervaded this community for so many decades. The difficult job then confronting advocates and governmental agencies was perhaps best illustrated by the painfully slow growth in the use of TTYs that had characterized the twenty year period after these devices were first introduced in the United States. In 1966, two years after the first TTY was designed, only eighteen TTYs were in operation in America. This number grew to only 2,500 by 1977, and to somewhere between 40,000 and 100,000 as late as 1984, despite a population of at least 20 million individuals with hearing loss by that time.<sup>19</sup> Although TTYs were then the *only* way that individuals with severe hearing loss or speech disabilities could communicate by phone, still most had little awareness of the availability of this equipment.

It is for the above reasons that when the ADA's mandates for nationwide relay services became effective, the FCC made a point of requiring relay providers to conduct outreach and education on the newly mandated services. The Commission explained "[w]e believe that public access to information regarding the availability, use of service, and means of access, is critical to the implementation of TRS."<sup>20</sup> Repeatedly, throughout its relay regulatory history, the FCC has reaffirmed this principle, noting in its own rules that "efforts to educate the public

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<sup>19</sup> Karen Peltz Strauss, A New Civil Right (Washington D.C.: Gallaudet University) (expected publication July 2006).

<sup>20</sup> *Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Report and Order and Request for Comments*, CC Dkt. No. 90-571, FCC 91-213 (July 26, 1991), ¶26.

about TRS should extend to all segments of the public, including individuals who are hard of hearing, speech disabled, and senior citizens as well as members of the general population.<sup>21</sup> Similarly, in March of 2000, the FCC stated that in order for Title IV to achieve functional equivalency, “[i]t is crucial for everyone to be aware of the availability of TRS.”<sup>22</sup> The FCC went on to explain that “TRS was designed to help bridge the gap between people with hearing and speech disabilities and people without such disabilities with respect to telecommunications services. The lack of public awareness prevents TRS from achieving this Congressionally mandated objective.” Similarly, though in June of 2004, the Commission rejected the development of a NECA-funded national outreach program (fearing that the costs of such a program would be “prohibitive, with uncertain outcomes”<sup>23</sup>), the Commission made clear that provider costs “attributable to reasonable outreach

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<sup>21</sup> 47 C.F.R. §64.604(c)(3).

<sup>22</sup> Improved Services Order at ¶ 105. See also “[C]onsumer education, training and outreach are essential to the success of TRS.” *Telecommunications Relay Services, the Americans with Disabilities Act of 1990, and the Telecommunications Act of 1996, Notice of Inquiry*, 12 FCC Rcd 1152, ¶ 45 (1997). In addition, the FCC’s order on 711 expressly stated that “on-going and comprehensive education and outreach programs to publicize the availability of 711 access in a manner reasonably designed to reach the largest number of consumers possible” would be necessary to achieve the successful use of this abbreviated dialing code. The Commission confirmed that “[t]o the extent costs of education and outreach are attributable to the provision of interstate TRS, . . . relay providers should include these costs as part of their annual data report of their total TRS operating expenses.” *Use of N11 Codes and Other Abbreviated Dialing Arrangements, Second Report and Order*, CC Dkt. No. 92-105, FCC 00-257 15, FCC Rcd 15188, (August 9, 2000), ¶61.

<sup>23</sup> *Telecommunications Relay Services and Speech-to-Speech Services for Individuals with Hearing and Speech Disabilities, Report and Order, Order on Reconsideration, and Further Notice of Proposed Rulemaking*, CC Dkt. No. 90-571, CC Dkt. No. 98-67, CG Dkt. No. 03-123, 19 FCC Rcd 12475 (June 30, 2004), ¶97.

efforts” were already permissible costs from the Interstate TRS Fund.<sup>24</sup> In the same breath, the Commission emphasized that:

outreach is an issue of recurring and serious importance for TRS users. Those who rely on TRS for access to the nation's telephone system, and thereby for access to family, friends, businesses, and the like, gain little from the mandate of Title IV if persons receiving a TRS call do not understand what a relay call is and therefore do not take the call, or if persons desiring to call a person with a hearing or speech disability do not know that this can easily be accomplished through TRS (and dialing 711). We also recognize the strong sentiment reflected in the comments that outreach efforts to date have not been adequate.”<sup>25</sup>

## V. CONCLUSION

NECA’s submission to the FCC reveals the lack of consistency and openness that has pervaded the cost recovery process for VRS for the past several years. In each of these years, the failure to follow uniform and transparent cost recovery policies and the sudden policy reversals that have occurred have left providers on their own to take guesses as to what will be allowed as compensation for their video relay services. The failure to either provide advance notification or justification for arbitrary cost exclusions, in addition to being in violation of the APA, has left CSD and other providers ill-prepared to effectively plan for the provision of VRS.

CSD urges the Commission to reinstate consideration of marketing and advertising expenses, and to clearly define a compensation methodology for VRS by refreshing and completing the record opened in its December 2001 order.

Respectfully submitted,

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<sup>24</sup> *Id.*

<sup>25</sup> *Id.* at ¶95.

/s/

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